

## Durham Research Online

---

### Deposited in DRO:

02 August 2011

### Version of attached file:

Accepted Version

### Peer-review status of attached file:

Peer-reviewed

### Citation for published item:

Masterman, R.M.W. (2009) 'Labour's 'Juridification' of the Constitution.', *Parliamentary affairs*, 62 (3). pp. 476-492.

### Further information on publisher's website:

<http://dx.doi.org/10.1093/pa/gsp013>

### Publisher's copyright statement:

This is a pre-copy-editing author-produced PDF of an article accepted for publication in *Parliamentary affairs* following peer review. The definitive publisher-authenticated version Masterman, R.M.W. (2009) 'Labour's 'Juridification' of the Constitution.', *Parliamentary affairs*, 62 (3). pp. 476-492 is available online at: <http://dx.doi.org/10.1093/pa/gsp013>

### Additional information:

---

## Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

# Labour's 'Juridification' of the Constitution

ROGER MASTERMAN\*

## ABSTRACT

This article responds to a number of points made by Mark Bevir in his recent article 'The Westminster Model, Governance and Judicial Reform' [2008] *Parliamentary Affairs* 559, in which Bevir highlights the 'increasing role of the courts in the processes of collective decision making' which has been the result of, inter alia (but of particular importance to Bevir's argument), the passage and implementation of the Human Rights Act 1998 and the Constitutional Reform Act 2005. This article puts forward an alternate view of Labour's recent record on constitutional reform, arguing that, while the contemporary constitution may have seen an increased degree of 'juridification' of the sort described by Bevir, the strengthening and development of political mechanisms of accountability has also been of considerable importance to Labour's constitutional reform programme, and that, as a result, the 'juridification' of the constitution is not the incontrovertible and relentless process that Bevir appears to suggest.

Mark Bevir's article 'The Westminster Model, Governance and Judicial Reform' addresses the implications of specific aspects of recent Labour administrations' constitutional reform programme for democratic governance in the UK. Amongst the numerous discrete reforms implemented, Bevir highlights the 'increasing role of the courts in the processes of collective decision making'<sup>1</sup> which has been the result of, inter alia (but of particular importance to Bevir's argument), the passage and implementation of the Human Rights Act 1998 and the Constitutional Reform Act 2005. Bevir's contention is that recent reforms have contributed to a continuing 'juridification' of the constitution which has resulted in a corresponding narrowing of the sphere of effective democratic decision-making.

Bevir's synopsis of the meanings of 'juridification' can be taken to cover a range of interrelated trends and developments. Citing the work of Lars Blichner and Anders Molander<sup>2</sup> – with which he appears to sympathise – Bevir writes that 'juridification' can take a number of forms:

1. '... "constitutive juridification" is the process by which the norms of a political system are created or changed to improve the competencies and role of the legal system';
2. 'juridification can occur when legal regulation is expanded or increasingly differentiated';

3. 'juridification takes place when social actors, in and outside government, increasingly refer to the law to resolve conflicts';
4. '[a] fourth type of juridification is identified with the courts and the judges playing an increasingly prominent role in lawmaking';
5. 'a fifth type of juridification is a vague process in which people increasingly come to define themselves and others in legal terms, such as what it means to be an EU citizen.'<sup>3</sup>

Hence, 'juridification' can encompass a range of tangible developments; the proliferation of legislation as a tool of governance and regulation, the formulation of legislative or constitutional standards by elected legislatures, the ability of the judicial branch to make law and the utilisation of law as a tool of dispute resolution for example. Equally, 'juridification' can, on this reading, include a number of more intangible developments including the awareness of an individual of their status, or potential, as a legal actor, the increased propensity for individuals and groups to see courts as the appropriate forum for the resolution of social disputes, and perhaps even simply an increased use of legal terminology in discourse. These developments are all – to varying degrees – evident in the United Kingdom's recent constitutional history.

However, as Blichner and Molander recognise, the concept of 'juridification' is 'ambiguous' and is often used interchangeably with ideas of 'judicialisation' or 'legalisation.'<sup>4</sup> The focus of this piece will lie in the reading of 'juridification' which suggests that through the formulation of legal standards which allow for judicial input into their definition and regulation, the scope and range of decisions which can be made in the democratic sphere is necessarily reduced, and the effectiveness of elected institutions of government lessened. The use of courts, as opposed to the political process, as a mechanism for restraining or scrutinising the actions of elected politicians is central to this conception of 'juridification,' and objections to the extension of judicial power in this regard – especially so far as it requires engagement with the substance of policy choices – have proceeded on basis of the effective disenfranchisement of the electorate which results when decisions taken by elected representatives can be overturned by a small group of unelected, unaccountable judges.<sup>5</sup> Increasing the role of the courts in determining the legitimate limits of executive (and possibly legislative) action might well be more accurately referred to

as the ‘judicialisation’ or ‘legalisation’ of the constitution, but for the sake of consistency the terminology adopted by Bevir will be adhered to in this piece.

Access to a court structure in the event of alleged ultra vires activity carried out by a public authority or servant is of course a basic requirement of the rule of law.<sup>6</sup> Perhaps the most obvious example of the ‘juridification’ of the United Kingdom’s constitution in this regard has been the development and expansion of the judicial review jurisdiction during the latter years of the twentieth century.<sup>7</sup> The development of judicial review led in turn to an increased judicial engagement with decisions with social policy and resource allocation implications and increasingly ran in parallel with a growing perception of the failure of established political mechanisms of holding government to account. This weakness of the ‘political constitution’ was only highlighted by the increased strength of the executive branch vis-à-vis Parliament, and further exacerbated by changes in governmental management and the delivery of governmental services. The growth of executive agencies and the increased propensity to contract-out the business of government in particular came with adverse consequences for parliamentary lines of accountability which were exposed in a number of high-profile controversies during the mid-1990s.<sup>8</sup> Such were the perceived failings of constitutional conventions and parliamentary practice – established ‘political’ mechanisms of accountability – to accommodate these new techniques of governance that commentators questioned the continuing relevance of, for example, the doctrine of ministerial responsibility as a tool of ensuring accountability.<sup>9</sup> As Eric Barendt argued in 1997:

... constitutional conventions are quite worthless as a check on the power of central Government ... the conventions regulating the relationship of the political executive to Parliament and the public (ministerial responsibility and collective Cabinet responsibility) are at the mercy of the changing attitudes of politicians ...<sup>10</sup>

This lack of faith in the mechanisms of the ‘political constitution’ lay behind many of the proposed constitutional reforms of the incoming Blair administration in 1997 with its commitments to decentralisation, subsidiarity and the strengthening of Parliament.<sup>11</sup> But while the implementation of this wide-ranging programme of reform has – for the generally incremental development of the British constitution –

been revolutionary, this revolution has not yet seen the jettisoning of established constitutional features to the extent suggested by Bevir. The essential characteristics of the constitution remain unquestioned; Parliament, and not the judiciary, remains the dominant law-making force in the constitution, while the primary role of the courts remains the interpretation and application of the law, not the design and implementation of policy.

This piece does not seek to deny that the sphere of influence possessed by the judicial branch over decisions taken by elected officials has significantly expanded over the last half-century, nor that certain reforms enacted by recent Labour administrations have contributed to a further realignment of governmental power in this regard. Rather, this piece proposes an alternate reading of recent Labour administrations' constitutional reforms which challenges that put forward by Bevir. While it is accepted that the implementation of the Human Rights Act 1998 caused a notable repositioning of judicial power vis-à-vis that of the elected branches of government, Bevir's analysis of the Act neglects to examine the careful attempts made by the Labour Government responsible to preserve the supremacy of democratic decision making in the domestic protection of human rights. The Human Rights Act model was adopted for the very reason that it accommodated the possibility of disagreement between judges and politicians, and – in the event of the making of a judicial declaration of incompatibility – allows the latter the discretion of how, and indeed whether, to amend the disputed statute in line with judicial opinion. It is further contended that Bevir's suggestion that the Constitutional Reform Act 2005 has directly contributed to the processes of 'juridification' is slightly perplexing. First, that Act does not extend the reach of judicial power into new spheres. Secondly, rather than narrowing the range of effective democratic decision-making, the Constitutional Reform Act can be said to promote greater openness and accountability for the reason that it removes the power of one unelected Minister to effectively control a range of senior judicial appointments and, by allowing the Lord Chancellor to sit in the House of Commons, improves the ability of elected representatives to hold the occupant of that office directly to account.

Finally, it is suggested that, when Labour's constitutional reforms since 1997 are taken as a whole, it is possible to discern a significant, parallel trend evident in the notable attempts to extend the depth and range of the accountability of government through participation in the political process. This trend is most obvious in the

devolution of power from central government to sub-national assemblies and administrations, and in ongoing attempts to strengthen Parliament as a representative body and as an institution capable of effectively holding the executive branch to account. Contrary to Bevir's claims therefore, it is entirely arguable that the cumulative effect of Labour's reforms has been to rejuvenate the place of political accountability – alongside a limited judicial protection of human rights – within the constitution. In other words, the 'juridification' of the British constitution may not be the incontrovertible and relentless process that Bevir appears to suggest.

#### THE PERSISTENCE OF THE DICEYAN CONSTITUTION

Part of the difficulty with Bevir's assessment is the insistence that parliamentary sovereignty remains the monolithic principle declared by Dicey in his *Introduction to the Study of the Law of the Constitution*, and that our appreciation of new mechanisms and institutions of government is hampered by a lingering attachment to a constitution which can be ultimately distilled into fairly straightforward terms: Parliament makes the law and the judges apply it, faithful to the words chosen by the legislature. On such an analysis, Parliament's legal authority is absolute and the judicial role is purely mechanical.

While the sovereignty of Parliament as a legal doctrine holds that Parliament can legislate on whatever subject, in whatever terms it chooses, the doctrinal certainty of Dicey's conception of parliamentary supremacy has always been tempered by the demands of contemporary political practice and climate. Dicey himself recognised that while the sovereignty of Parliament might well be an 'undoubted legal fact' there were nevertheless 'many enactments ... which Parliament never would and (to speak plainly) never could pass.'<sup>12</sup> While the legislature may possess the theoretical legal power to enact unpopular or Draconian legislation, should it in practice do so, 'Parliament must squarely confront what it is doing and accept the political cost.'<sup>13</sup> In the continuing absence of a general judicial power to invalidate parliamentary legislation, the constraints on the legal power of Parliament – excluding those imposed by the United Kingdom's accession to the European Union<sup>14</sup> – remain political rather than legal in nature.<sup>15</sup> As a result, as Lord Steyn observed in the House of Lords decision of *Jackson v Attorney General*:

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution.<sup>16</sup>

While Mark Tushnet may have recently been able to argue that '[f]or all practical purposes, the Westminster model has been withdrawn from sale,'<sup>17</sup> the doctrine of parliamentary sovereignty on which it is based has shown itself to be sufficiently fluid to be able to accommodate the voluntary acceptance of limitations to Parliament's legislative monopoly which took effect on the United Kingdom's accession to the European Union,<sup>18</sup> the devolution of power to sub-national assemblies and legislatures,<sup>19</sup> and the ability of the decisions of one Parliament to control the manner and form in which subsequent legislative decisions might take effect.<sup>20</sup> The contemporary constitutional value of Dicey's conception of sovereignty lies not therefore in 'a constitution within which popular participation was restrained,'<sup>21</sup> but in the ultimate commitment that the principle shows to government by elected and removable representatives, rather than by unelected and unaccountable judges.<sup>22</sup> The British constitution remains political in the sense that the ultimate source of constitutional authority is the elected Westminster Parliament; judges do not possess a general power to disapply, strike down or otherwise invalidate legislative decisions debated and endorsed in the legislature.

Yet, equally, it would be mistaken to regard the constitution as being so 'political' in character as to deny the judicial branch a meaningful role. While it is technically correct to suggest that the judicial branch is not – in the British system – a co-equal branch of government, nor is it perhaps realistic to describe the judicial branch as being entirely subservient to the will of Parliament. The judicial branch does possess a limited law-making role in respect of the common law,<sup>23</sup> while the authoritative ability of the courts to declare the meaning of statute law and to act as a check on the exercise of discretionary power demonstrates the coercive authority wielded by the judicial branch over the elected arms of government; to paraphrase Lord Templeman's dicta in *M v Home Office*, the executive does not obey the law as a matter of grace, but as a matter of necessity.<sup>24</sup>

It would also be a mistake however, to assume that the 'legal' and the 'political' spheres of courts and politicians and officials operate in complete isolation

of each other. Drawing on the Dicey's legalistic interpretation of sovereignty, this is the trap into which Bevir falls. The reading of 'juridification' adopted by Bevir appears to contemplate no sphere of interaction between political and legal processes, seeming to argue that, once Parliament has enacted legislation on a given subject, future 'democratic' decisions in respect of that subject are, if not precluded, then strictly curtailed. Bevir suggests that:

... when a representative institution creates a rule on an issue and hands the application of that rule to the courts, it thereby constrains the space for *any* future democratic decisions on that issue.<sup>25</sup>

Obviously, it would be mistaken to say that once a certain rule had been established by Act of Parliament, then that rule could not be overturned or replaced – following deliberation in the legislature – by a subsequent Act of Parliament. This does not appear to be what Bevir suggests. Instead, he puts forward a viewpoint which nevertheless appears to erroneously regard 'politics' and 'law' as entirely distinct disciplines which do not, and cannot, interact, under which the former is 'good', the latter, seemingly 'bad.' On this reading of the constitutional separation of power there would appear to be little value to be found in either the capability of the judicial branch of government to resolve disputes independently of party political considerations, or in the ability of the individual to regulate his or her conduct by reference to a relatively stable and certain body of law. Such a 'stark separation of legal rule from political principle' is, as T. R. S. Allan has argued, 'ultimately incoherent.'<sup>26</sup>

Bevir appears to suggest that once a rule is framed in legislative terms, to be enforced by the courts, the implementation of that rule becomes a matter of 'law' – and therefore indicative of the juridification of the political process – and the 'scope for democratic processes within civil society or within governmental institutions themselves' to influence the exercise and enforcement of that rule becomes increasingly narrow.<sup>27</sup> While it might well be possible to suggest that the implementation of a given rule – policed by the judicial branch – may well constrain the exercise of future decisions taken within the rule's scope of application, the establishment of such a regime does not simply transform every decision taken to one of 'law' in which 'political' considerations are irrelevant. In the first instance, such a



view almost completely ignores the fact that the enactment of legislation is a process which often follows on the back of manifesto commitments endorsed by the electorate, frequently occurs following lengthy and broad public consultation, and only ever occurs after deliberation in both Houses of Parliament. Most importantly, the enactment of parliamentary legislation reflects a policy decision that legal regulation is the most appropriate mechanism by which to achieve a particular policy goal. While one might criticise defects in the consultation process, lament apathy at the polls or question the rigour with which Parliament scrutinises draft legislation, it must also be acknowledged that legal regulation has been chosen as the appropriate tool of public administration by elected representatives.

The primary role of the courts in this regard, in the interpretation and application of statutory purpose, is not an exercise in which the text of the statute is considered to the exclusion of all other sources of information and authority. However, the determination of legislative intent consistent with the rule of law is accompanied by a recognition that Parliament remains the dominant source of (political and legal) authority in the constitution. It is to accommodate their relative lack of democratic or representative legitimacy that the courts have long attempted to avoid the judicial review of the merits of executive and administrative decisions,<sup>28</sup> have not gone the way of the United States Supreme Court in establishing a common law power to strike down Acts of Parliament,<sup>29</sup> and – increasingly in the Human Rights Act era – have adopted a variable standard of review which affords, in the appropriate circumstances, a degree of respect to the decisions of the elected branches of government.<sup>30</sup> This latter point should be emphasised. On Bevir's account, the degree of scrutiny to which the courts can subject executive decisions – whether *Wednesbury* standard reasonableness review or a power to strike down legislative decisions – is, seemingly, unimportant. Yet it is contended however that this distinction is highly relevant to the dividing lines between elected and judicial power as it governs the degree to which courts can interfere with, or overturn, decisions taken following debate and deliberation by political actors. Judicial review of administrative action in the United Kingdom has remained a largely procedural guarantee; the courts are concerned with the procedural and legal propriety of the impugned decision, not its merits. The distinction between review and appeal therefore 'reflects a conception of limited judicial authority, recognising that in most

cases a public authority may exercise a genuine choice between competing public policy objectives and contrasting methods of implementation.’<sup>31</sup>

The constitution can *only* therefore be effectively appreciated as a complex and fluctuating dynamic with circumstances – and the responses of relevant actors – determining whether its political or legal elements are placed at the fore. While Bevir appears to lament the fact that ‘constitutional lawyers were slow to recognise the extent to which law intervened in politics’<sup>32</sup> he himself pays scant regard to the fact that the relationship between the two spheres is intimately intertwined; law may well intervene in matters of politics, but politics and political argument shape the law. Bevir argues that the ‘lingering presence of the Westminster model encourages the government to treat the law as apart from politics,’<sup>33</sup> yet ironically this is exactly what Bevir himself does, through his adoption of a particularly rigid interpretation of outdated Diceyan views and by giving little credence to the symbiotic relationships between legal and political processes and actors.

#### LABOUR’S CONSTITUTIONAL REFORM AGENDA

Bevir’s contention is that Labour’s constitutional reforms – instead of revitalising democratic participation – have ‘turned to judges as experts who can provide efficient protection of human rights and welfare.’<sup>34</sup> It is unsurprising then that Bevir’s survey of the Labour reforms pays little attention to those developments which were specifically designed to enhance accountability and participation in the democratic process; among them, devolution to Scotland, Wales and Northern Ireland,<sup>35</sup> the creation of the Greater London Authority and election of Mayors in London<sup>36</sup> and elsewhere,<sup>37</sup> reforms to the party funding systems,<sup>38</sup> the implementation of Freedom of Information legislation,<sup>39</sup> the removal of the majority of hereditary peers from the Upper House<sup>40</sup> and, most recently, the attempts to incorporate an elected membership to the House of Lords.<sup>41</sup>

The lack of coverage of the devolution of power to Scotland, Wales and Northern Ireland in this regard is of particular concern. Contrary to the suggestions of Bevir, the manifest aim of the devolution of power to Scotland, Wales and Northern Ireland was to enable the discharge of governmental functions at a level which was not as far removed from the concerns of the local electorate as Westminster, and to facilitate the ability of the local electorate to hold those making decisions on their

behalf to account. Taking the devolution of power to Wales under the Government of Wales Act 1998 as an example, Wicks suggests:

... the most important achievement of the 1998 scheme has been increased democratic legitimacy and accountability. Powers – both executive and legislative – previously exercised by a minister in London (and, under the Conservatives, a minister unlikely to even represent a Welsh constituency) are exercised and scrutinised by Welsh politicians in Cardiff.<sup>42</sup>

Not only were these new systems of government designed to enhance local accountability and representation, they were only implemented following popular endorsement by way of referendum. The continuing utility of the referendum device as a mechanism to trigger or reject further constitutional amendment can be seen in legislative provisions regarding the self-determination rights of the Northern Ireland electorate,<sup>43</sup> the popular rejection – in 2003 – of the Government's proposals for an elected regional assembly in the North East of England,<sup>44</sup> and in the potential transfer of legislative power to the National Assembly for Wales.<sup>45</sup>

Devolution in practice has seen the implementation of a number of systems of proportional representation designed to produce more equitable representation than the first past the post system currently used for elections to the Westminster Parliament. The adoption of the additional member system in elections to the Scottish Parliament and National Assembly for Wales, alongside the use of the single transferrable vote system in Northern Ireland, has gone some way towards producing assemblies whose composition more accurately reflects the division of the popular vote between political parties than is evident at Westminster. The unique power-sharing arrangements put in place under the Northern Ireland Act 1998, and use of the d'Hondt mechanism to allocate ministerial positions, take this notion of proportionality yet further, ensuring that legislative *and* executive positions reflect the division of votes cast and requiring that cross-community support – in preference to decision-making by simple majority – be necessary to achieve certain objectives. In addition devolution has produced a number of innovative – in Westminster terms at least – mechanisms designed to increase participation in the democratic process, among them the establishment of the Public Petitions Committee in the Scottish

Parliament which provides a direct avenue for members of the electorate or groups to have their views aired in the legislative forum.

The jurisdiction of the courts to adjudicate over so-called ‘devolution issues’ is of course a by-product of the devolution of power to Scotland, Wales and Northern Ireland. In theory, the transfer of power to the courts to determine disputes over the competences of Scotland, Wales and Northern Ireland’s legislatures was itself an extension of judicial power to cover, and possibly curtail, the exercise of power by the newly-created democratically elected bodies. Yet the practice of devolution disputes to date has given rise to only a limited body of case law dealing with human rights issues, and – contrary to the expectations of those commentators who predicted that the Judicial Committee of the Privy Council would ‘assume the role of a constitutional court’<sup>46</sup> – has to date given rise to no case law concerning disputes over competence between Westminster and the devolved administrations.<sup>47</sup>

#### THE HUMAN RIGHTS ACT 1998

The process of ‘juridification’ precipitated by the Human Rights Act, Bevir writes, has seen Parliament ‘concede ... to the judiciary the power of reviewing legislative acts against a formal written document.’<sup>48</sup> This potentially misleading assessment of the judicial role under the Act is then compounded by the wide-reaching assertions that:

By empowering the courts with a new capacity to review domestic legislation, the Act effectively welcomes the courts into the policy-making process.

And:

Technically, the HRA still leaves the courts only interpreting prior [sic] legislation, although in practice they may come close to legislating.<sup>49</sup>

This overly simplistic explanation of the effects of the Human Rights Act requires further analysis. First, Bevir’s assessment of the Human Rights Act pays scant regard to the fact that the system of rights protection which it establishes is manifestly not one which provides the judicial branch with the exclusive competence to determine those questions of human rights which arise by way of litigation in domestic courts.

The Human Rights Act was not intended to be – and has not been in practice – the sole preserve of the judges. As a model of rights protection, the Act eschews the ‘orthodox precedents’<sup>50</sup> of other Bills of Rights by failing to provide a judicial power to invalidate legislation, and by providing mechanisms by which political and legal disagreement over questions of rights can be accommodated into existing constitutional arrangements. It is for this reason that Lord Bingham was able, early in the life of the Human Rights Act, to say that, ‘[j]udicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them.’<sup>51</sup> As a result, and rather than treating domestic courts as the ultimate arbiters of human rights in the UK, the Human Rights Act demands the participation of each of the branches of government and has been said to provoke a dialogue between the three arms:

[the Human Rights Act] is informed by a view of human rights that acknowledges that they are not always, or even usually, absolute but derive from political struggle and thrive on political argument. The purpose of the dialogue model is to keep the idea and dynamic of human rights alive, rather than close down the debate about them and hive them off to a rarefied court.<sup>52</sup>

Parliamentary and executive input is therefore central to the operation of the Act. The section 19 scrutiny procedure seeks to ensure that legislative proposals are vetted for compatibility with human rights standards during both policy making and parliamentary processes, while the ‘indefatigable’<sup>53</sup> Joint Parliamentary Committee on Human Rights has monitored legislative proposals, the implementation of remedial orders and conducted significant inquiries into wider human rights concerns. Under section 3 the courts have undoubted power to interpret legislation ‘so far as it is possible to do so’ to achieve compatibility with the Convention Rights. But this power is not unlimited and in the event of the making of a declaration of incompatibility the elected branches will have the final say. The role of judges under the Human Rights Act is therefore only part of a wider project concerning all three branches of government.

Further, it is unclear how the ex post facto system of legislative ‘review’ instigated by the Human Rights Act 1998 invites the judiciary to ‘make policy’. The powers of judicial review available to the judiciary under the Human Rights Act

afford neither an overarching power of review, nor a power to instigate any such review. It is implicit in the design of the Human Rights Act that Parliament, and not the judiciary, possesses superior law making power, and the Act does nothing to attempt to insulate judicial opinion from the power of Parliament. Neither a section 3 interpretation, nor a section 4 declaration, affects the ‘validity, continuing operation or enforcement’ of the statutory provision in respect of which it is made. Further, the role of the courts is limited not only by the scope of the section 3 interpretative power (and the Convention rights with which the exercise of that power should be consonant), but also by the context of those cases which come before them.<sup>54</sup> The courts can, as a result, ‘check *only a portion* of legislative activity.’<sup>55</sup>

It may be realistic to suggest that, in light of the ability of the courts to declare legislation incompatible, legislative decisions are taken in the knowledge of their possible subsequent ‘interpretation’ under section 3 of the Act. This is not however the same as suggesting – as Bevir does – that judges are now openly participating in the policy-making process. As the above indicates, any judicial intervention must necessarily occur in response to a legislative decision already taken by Parliament in pursuance of a given policy aim. At best this can be regarded as an indirect avenue into the policy-making process, and one which itself comes as a direct result of a specific Parliamentary intervention.

While it is correct to assert that the role of the judges under section 3 of the Human Rights Act is to interpret legislation compatibly with the Convention Rights, Bevir’s bald assertion that ‘in practice they may come close to legislating’ is not developed at any level of detail. Assertive and creative judicial interpretations *have* been deployed in adjudication under the Human Rights Act, yet it has been a recurring feature of litigation under the Act that the higher courts have been reluctant to act in a way which would overtly usurp the legislative function.<sup>56</sup> Even in those instances in which section 3 has been used in the most robust or creative way the interpretations adopted have followed the clear authority of the European Court of Human Rights,<sup>57</sup> and the courts have stopped short of rendering a statutory provision meaningless – that is effectively invalidating it – under the guise of interpretation.<sup>58</sup>

It is true to say that, even within the system established by the Human rights Act, Parliament is not given free rein; any ‘dialogue’ must take place within the supervisory jurisdiction of the European Court of Human Rights to which the UK, as a signatory to the European Convention on Human Rights, remains subject. But even

given this, Parliament has significant discretion over the nature of the response to either a declaration of incompatibility or judicial use of section 3(1); this is especially the case in those areas where qualified rights are in play, or in those areas in which the state response may be afforded a margin of appreciation by the Strasbourg Court. This may be a ‘juridification’ of sorts, but not of the type where political judgment is entirely at the mercy of the judicial branch.

#### THE CONSTITUTIONAL REFORM ACT 2005

While discussion of the Human Rights Act as a catalyst of juridification is not surprising – it is widely accepted that the Act would see Parliament and the executive cede a degree of authority to the courts<sup>59</sup> – Bevir’s discussion of the Constitutional Reform Act 2005 in similar terms is perplexing, for it is by no means clear that the creation of a Supreme Court for the United Kingdom will mark a further narrowing of the scope and range of power exercised by democratic institutions. This is for the reason that the UK Supreme Court is not designed to be a Supreme Court in the US or Canadian sense; the new court will not possess a power of legislative strike down, nor will it be able to exercise a procedure of judicial reference akin to that available to the European Court of Justice – both innovations were rejected outright during the consultation process for the reason that they would ‘sit very uneasily’ with our judicial and constitutional traditions.<sup>60</sup> In short, the Constitutional Reform Act 2005 will not transfer any additional power to the new Supreme Court which is not already held by existing judicial bodies.<sup>61</sup> What the Act does, is transfer competence for the determination of ‘devolution issues’ to the Supreme Court. But – as Bevir acknowledges – this power is currently held by a court; the Judicial Committee of the Privy Council. Beyond this, the new Supreme Court will exercise the exact same powers as currently exercised by the Appellate Committee of the House of Lords. In fact, the creation of the Supreme Court should perhaps not be regarded as a novel or significant development at all, for the reason that, ‘[i]n devising the new court, the government ... rejected almost every innovation that could have been introduced: in terms of its personnel, jurisdiction, and powers, the UK Supreme Court will closely replicate its predecessor.’<sup>62</sup>

The creation of the Supreme Court will not therefore come hand in hand with an explicit extension of the jurisdiction of the UK’s top courts. It may be plausible to speculate that the establishment of the Supreme Court – and the increased institutional

separation from the legislature which will result – might coincide with an increased willingness to assert itself against the executive and possibly Parliament. But at this stage – prior to the establishment of the Supreme Court – it is equally plausible to suggest that the emergence of the Law Lords from ‘beneath the robes of [the] legislative assembly’<sup>63</sup> might not be accompanied by the Supreme Court’s immediate assertion of its new-found independence.

By contrast with Bevir’s claims, two other significant accomplishments of the Constitutional Reform Act enhance, rather than diminish, effective political accountability. The first of these achievements relates to the *powers* of the Lord Chancellor. The Constitutional Reform Act saw the end of the Lord Chancellor’s tripartite role as cabinet minister, head of the judiciary in England and Wales and speaker of the House of Lords. The reformed office of Lord Chancellor retains only the first of those three roles, with the Lord Chief Justice becoming head of the judiciary in England and Wales, and the House of Lords now able to elect its own Lord Speaker. Even as a Cabinet Minister however, the reformed office of Lord Chancellor has been shorn of a number of the responsibilities which had prompted calls for the abolition (or reform) of the office. Foremost among them were the powers of the Lord Chancellor – exercised both personally and via recommendations to the Prime Minister – to exercise significant control over judicial appointments. Criticisms of the closed and secretive processes adopted had been widespread.<sup>64</sup>

The establishment of a Judicial Appointments Commission has put in place a significantly more transparent process than previously existed. While the holder of the reformed office of Lord Chancellor retains the power to make recommendations for certain judicial appointments to the Queen, the recommendation is made on the basis of a shortlist drawn up by the new Judicial Appointments Commission, which is in turn prepared with regard criteria specified by the Act.<sup>65</sup> Parliamentary oversight of the processes of appointment is therefore both preserved – as the Lord Chancellor retains the formal power to make the recommendation for judicial appointment, and remains responsible to Parliament for so doing – and facilitated through an increased openness in the decision-making procedure.

The other – related – achievement of the Constitutional Reform Act in respect of openness and accountability relates to the *position* of the Lord Chancellor within Parliament. The fact that the Lord Chancellor exercised powers pertaining to legal and judicial policy had long been said to justify insulating the office holder from party



politics and as such the Lord Chancellor had, by convention, sat in the House of Lords. Yet prior to the passing of the Constitutional Reform Act 2005, such were the ministerial responsibilities of the holder of the office of Lord Chancellor that the holder of the position had become a ‘pivotal figure in several aspects of public life extending beyond the law and the administration of justice.’<sup>66</sup> The widening of the Lord Chancellor’s responsibilities into areas of significant party political controversy with increasing resource implications had begun to undermine the grounds on which the office holder had traditionally not been drawn from the ranks of the House of Commons. As Diana Woodhouse wrote in research published in 2001:

Judicial independence has ... been used to deflect criticism of the Lord Chancellor’s lack of direct accountability to the elected chamber ... Yet ... the House of Lords ... has no constitutional responsibility to hold Ministers to account for the way in which the money is spent. Given the current status of the [Lord Chancellor’s Department], as a large spending department, this is less than satisfactory, for it means the Lord Chancellor escapes the routine accountability, extracted from Ministers in charge of departments, and the requirement that he appears before the House to answer for his department when things go wrong.<sup>67</sup>

Following the rejection of an amendment requiring that one of the qualifications required of potential holders of the post would be membership of the upper house, the Constitutional Reform Act 2005 does not require that future holders of the office of Lord Chancellor should sit in the House of Lords. The cumulative effect of these changes is that the individual ministerial discretion available to an unelected politician in the area of judicial appointments has therefore been significantly reduced, while the likelihood that the holder of the office will be exposed to more meaningful parliamentary scrutiny regarding the discharge of all of the Lord Chancellor’s responsibilities has been simultaneously increased.

## CONCLUSION

Bevir’s survey concludes by questioning whether ‘radical democracy and deliberative policy making’ can be effectively realised in a constitution which is willing to place such trust in the power of the judicial branch. Casting an eye ahead, Bevir suggests

that current constitutional discussions – for example on the potential development of a British Bill of Rights – will only further cement the ‘juridification’ of politics. Two final points should be made in response to this. First, recent debates over constitutional reform have indicated that – in spite of the perceived ‘juridification’ of the constitution – crises of accountability are not necessarily to be resolved through providing the judicial branch with increased power. This is illustrated particularly well by debates over the proposed Draft Constitutional Renewal Bill, which contains significant extensions to *Parliament’s* power to hold the executive to account in the exercise of prerogative powers.<sup>68</sup> That Parliament, and not the courts, is seen as the appropriate guarantor of accountability is both in defiance of the recent extension of judicial review into exercises of the prerogative,<sup>69</sup> and illustrates the enduring relevance of established frameworks of accountability within the ‘political constitution.’

Further, the Bill of Rights debate has been spurred by popular and political scepticism over the judicial enforcement of human rights under the Human Rights Act 1998. Indeed, given the current policy of David Cameron’s Conservative Party, it is hard to take seriously Bevir’s suggestion that ‘juridification – especially judicial review with reference to codified rights – appears to have become an unquestioned doxa of British politics.’<sup>70</sup> Far from being an accepted orthodoxy, adjudication over questions of rights by the judiciary has – in spite of the careful balance between elected and judicial power apparent on the face of the Act – become perhaps the most controversial of Labour’s constitutional reforms, and the one which, in the present political climate, appears most under threat of repeal.

It is equally plausible to argue that Labour’s programme of constitutional reform has contributed to a significant democratisation of the constitution, and that the promise of future constitutional renovation demonstrates that our elected representatives are not yet ready to cede complete constitutional authority to the judicial branch. While a degree of ‘juridification’ may be perceived in the development of the constitution, the codification of legal rights and expansion of the judicial review jurisdiction may also be defended as integral to the rule of law. Such developments are entirely in keeping with the dynamic nature of the unwritten constitution, and are by no means indicative of the transfer of ultimate constitutional authority from Parliament to the courts. The political constitution is not yet dead.

---

\* Durham Law School.

<sup>1</sup> M. Bevir, 'The Westminster Model, Governance and Judicial Reform' [2008] *Parliamentary Affairs* 559 (hereafter 'Bevir'), 559.

<sup>2</sup> L. Blichner and A. Molander, 'Mapping Juridification' (2008) 14(1) *European Law Journal* 36.

<sup>3</sup> Bevir, p.565.

<sup>4</sup> L. Blichner and A. Molander, 'Mapping Juridification' (2008) 14(1) *European Law Journal* 36.

<sup>5</sup> For example: J. A. G. Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1.

<sup>6</sup> *Entick v Carrington* (1765) 19 St Tr 1030.

<sup>7</sup> See: R. Stevens, 'Government and the Judiciary' and J. Jowell, 'Administrative Law' in V. Bogdanor (ed), *The British Constitution in the Twentieth Century* (Oxford: Oxford University Press, 2003).

<sup>8</sup> See: A. Tomkins, *The Constitution after Scott: Government Unwrapped* (Oxford: Clarendon Press, 1998), chs 1 and 2.

<sup>9</sup> As Jowell and Oliver argued in the preface to the fourth edition of their collection *The Changing Constitution*: '... the doctrine of individual ministerial responsibility has been significantly weakened over the last ten years or so, so that it can no longer be said, in our view, that it is a fundamental doctrine of the constitution' (J. Jowell and D. Oliver (eds), *The Changing Constitution* (4<sup>th</sup> ed, OUP, 2000), p.viii).

<sup>10</sup> E. Barendt, 'Is there a United Kingdom constitution?' (1997) 17 *Oxford Journal of Legal Studies* 137, 144.

<sup>11</sup> Labour Party, *New Labour: Because Britain deserves better* (London: Labour Party, 1997).

<sup>12</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982), p.24 and 26. See also: I. Jennings, *The Law and the Constitution* (5<sup>th</sup> ed) (London: University of London Press, 1959), p.170: 'De Lolme's remark that Parliament can do anything except make a man into a woman and a woman into a man is often quoted. But, like many of the remarks which de Lolme made, it is wrong ... Though it is true that Parliament cannot change the course of nature, it is equally true that it cannot in fact do all sorts of things. The supremacy of Parliament is a legal fiction, and legal fiction can assume anything.'

<sup>13</sup> *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131.

<sup>14</sup> *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.

<sup>15</sup> See: M Elliott 'Parliamentary Sovereignty and the new constitutional order: legislative freedom, political reality and convention' (2002) 22 *Legal Studies* 340; *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56, para.159 (Baroness Hale).

<sup>16</sup> *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56, para.56 (Lord Steyn) (emphasis in the original).

<sup>17</sup> M. Tushnet, 'New forms of judicial review and the persistence of rights- and democracy-based worries' (2003) 38 *Wake Forest Law Review* 813, 814.

<sup>18</sup> European Communities Act 1972. See also: *R v Secretary of State for Transport, ex parte Factortame (No.2)* [1991] 1 AC 603, 659 (Lord Bridge).

- 
- <sup>19</sup> Government of Wales Act 1998; Northern Ireland Act 1998; Scotland Act 1998. On which see: V. Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70(2) *Political Quarterly* 185, 186-189.
- <sup>20</sup> On the enduring influence of the Parliament Act 1911 and Parliament Act 1949 see: *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56.
- <sup>21</sup> Bevir, p.565.
- <sup>22</sup> K. D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *Modern Law Review* 79, 98-99.
- <sup>23</sup> A. V. Dicey 'Judicial Legislation' in *Lectures on the relationship between law and public opinion in England during the Nineteenth century* (London: Macmillan, 1914); Lord Reid 'The Judge as Law Maker' (1972-1973) 12 *Journal of the Society of Public Teachers of Law* 22.
- <sup>24</sup> *M v Home Office* [1994] 1 AC 377, 395 (Lord Templeman).
- <sup>25</sup> Bevir, p.565 (emphasis added).
- <sup>26</sup> T. R. S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), p.2.
- <sup>27</sup> Bevir, p.565.
- <sup>28</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
- <sup>29</sup> *Marbury v Madison* 5 US 137 (1803).
- <sup>30</sup> Compare eg: *Bellinger v Bellinger* [2003] 2 AC 267 with *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
- <sup>31</sup> T. R. S. Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) *Cambridge Law Journal* 671, 679.
- <sup>32</sup> Bevir, p.567.
- <sup>33</sup> Bevir, p.573.
- <sup>34</sup> Bevir, p.570.
- <sup>35</sup> Scotland Act 1998; Northern Ireland Act 1998; Government of Wales Act 1998. See also the Government of Wales Act 2006.
- <sup>36</sup> Greater London Authority Act 1999.
- <sup>37</sup> Local Government Act 2000.
- <sup>38</sup> Political Parties, Elections and Referendums Act 2000.
- <sup>39</sup> Freedom of Information Act 2000.
- <sup>40</sup> House of Lords Act 1999.
- <sup>41</sup> Ministry of Justice, *An Elected Second Chamber: Further Reform of the House of Lords*, Cm 7438 (July 2008).
- <sup>42</sup> E. Wicks, *The Evolution of a Constitution: Eight key moments in British Constitutional history* (Oxford: Hart Publishing, 2006), p.187.
- <sup>43</sup> Northern Ireland Act 1998, Section 1.
- <sup>44</sup> Regional Assemblies (Preparations) Act 2003
- <sup>45</sup> Government of Wales Act 2006.

---

<sup>46</sup> V. Bogdanor, 'Devolution: Decentralisation or Disintegration?' (1999) 70 *Political Quarterly* 185, 188.

<sup>47</sup> See: R. Hazell, 'Out of court: why have the courts played no role in resolving devolution disputes in the United Kingdom?' (2007) 37 *Publius* 578.

<sup>48</sup> Bevir, p.571.

<sup>49</sup> Bevir, p.571. Section 3 of the Human Rights Act also applies to legislation which post-dates the coming into force of that Act. The authority of Bevir's analysis in this section is further undermined by his apparent failure to note that the European Court of Human Rights is in fact quite distinct from the European Court of Justice. First, at p.568 Bevir states that accession to the European Union in 1972 allowed UK citizens recourse to two European judicial bodies, the European Court of Justice and the European Court of Human Rights. The UK had in fact allowed the right of individual petition to the European Court of Human Rights since 1966. Further, at p.571 Bevir asserts that one of the aims of the implementation of the HRA was to reduce the frequency with which the European Court of Justice [sic] found the UK in breach of its obligations under the Convention.

<sup>50</sup> C. A. Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), p.96.

<sup>51</sup> *Brown v Stott* [2003] 1 AC 681, 703.

<sup>52</sup> F. Klug, 'The long road to human rights compliance' (2006) 57(1) *Northern Ireland Legal Quarterly* 186, 201.

<sup>53</sup> F. Klug, 'The long road to human rights compliance' (2006) 57(1) *Northern Ireland Legal Quarterly* 186, 200.

<sup>54</sup> For a survey see: I. Leigh and R. Masterman, *Making Rights Real: The Human Rights Act in its first decade* (Oxford: Hart Publishing, 2008), ch 4.

<sup>55</sup> J. L. Hiebert, 'New Constitutional Ideas: can new parliamentary models resist judicial dominance when interpreting rights?' (2004) 82 *Texas Law Review* 1963, 1986 (emphasis added).

<sup>56</sup> *Re S (Children) (Care Order: Implementation of Care Plan)*; *Re W (Children) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291; *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467.

<sup>57</sup> *R v Offen* [2001] 1 WLR 253; *R v A (No 2)* [2002] 1 AC 45; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

<sup>58</sup> See: *R v Secretary of State for the Home Department, ex parte Anderson* [2002] UKHL 46; [2003] 1 AC 837.

<sup>59</sup> K. D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *Modern Law Review* 79. For forceful critiques of judicially-enforced Bills of Rights generally see: J. Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18; J. Allan 'Bills of Rights and Judicial Power – A Liberal's Quandary' (1996) 16(2) *Oxford Journal of Legal Studies* 337; J. Waldron, 'The core of the case against judicial review' (2006) 115 *Yale Law Journal* 1346.

<sup>60</sup> Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom* (CP 11/03), July 2003, paras.23-24.

---

<sup>61</sup> Nor – despite Bevir’s suggestion at p.573 – will judges on the UK Supreme Court enjoy the life tenure enjoyed by Justices of the US Supreme Court; judicial retirement ages will continue to be determined by the Judicial Pensions and Retirement Act 1993.

<sup>62</sup> A. Le Sueur, ‘Judicial power in the Changing Constitution’ in J. Jowell and D. Oliver (eds), *The Changing Constitution* (5<sup>th</sup> ed) (Oxford: Oxford University Press, 2004), p.331.

<sup>63</sup> W. Bagehot, *The English Constitution* (Oxford: Oxford World’s Classics, 2001), p.96.

<sup>64</sup> D. Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart Publishing, 2001), ch 6.

<sup>65</sup> Constitutional Reform Act 2005, ss.63-66.

<sup>66</sup> Lord Windlesham, ‘The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change: Part 1’ [2005] *Public Law* 806, 808.

<sup>67</sup> D. Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart Publishing, 2001), p.167.

<sup>68</sup> Ministry of Justice, *The Governance of Britain – Draft Constitutional Renewal Bill*, March 2008 (Cm 7342-II), available at: <http://www.justice.gov.uk/docs/draft-constitutional-renewal-bill.pdf>

<sup>69</sup> See eg: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R v Secretary of State for Foreign Affairs, ex parte Everett* [1989] QB 811; *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

<sup>70</sup> Bevir, p.575.